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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 24

IN THE MATTER OF FLORIDA EAST COAST RAILWAY CO., *Debtor*,

ST. JOE PAPER CO., *et al.*, *Petitioners*,

v.

ATLANTIC COAST LINE RAILROAD CO., *Respondent*.

BRIEF ON BEHALF OF PETITIONERS SOUTHERN AND SEABOARD

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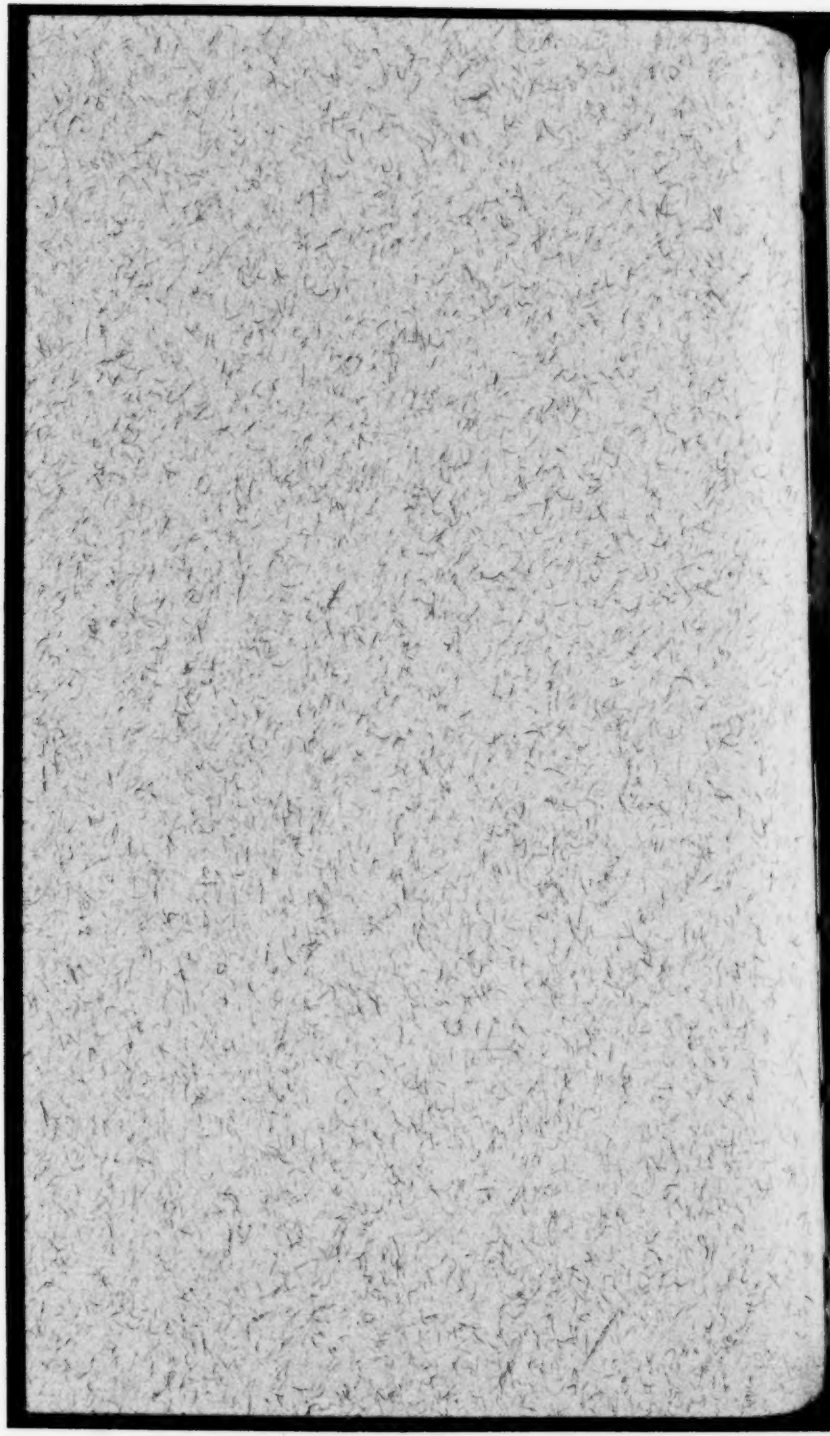

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BRIEF ON BEHALF OF PETITIONERS SOUTHERN AND SEABOARD

OPINIONS BELOW

The Opinion of the District Court for the Southern District of Florida (R. Vol. I, p. 127) is reported in 103 F. Supp. 825.

The opinion of the Court of Appeals for the Fifth Circuit (R. Vol. II, p. 717) is reported in 201 F. 2d 325.

JURISDICTION

The judgment of the Court of Appeals was entered January 19, 1953. Our petition for certiorari and supporting brief were filed in this Court on March 20, 1953. Certiorari was granted on May 4, 1953, 345 U.S. 948. Jurisdiction of this Court was and is invoked under Title 28, United States Code, § 1254(1).

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STATUTES INVOLVED

The statutes involved are:

1. Section 1(18) of the Interstate Commerce Act as amended, 49 U.S.C. § 1(18):

> (18) *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.*
>
> No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

2. Section 5(2)(a)(i), (b), (c), (d), and (f) of the Interstate Commerce Act as amended, 49 U.S.C. §5(2)(a)(i), (b), (c), (d), and (f):

> (2) *Unifications, mergers, and acquisitions of control.*
>
> (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this section—

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(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

* * *

(b) Whenever a transaction is proposed under subparagraph (a) of this section, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *

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(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

• • •

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the

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duly authorized representative or representatives of its or their employees.

3. Section 77 of the Bankruptcy Act, as originally enacted by the Act of March 3, 1933, 47 Stat. 1474, so as to make the Bankruptcy Act apply to the reorganization of railroads; and particularly the two "consistency clauses" thereof, as contained in subdivisions (b) and (e) thereof, requiring mergers or consolidations of railroads provided for in a reorganization plan to be approved thereunder to be consistent with the *provisions* of Sections 1 and 5 of the Interstate Commerce Act and with the *purposes* of that entire Act, as follows:

> (b) A plan of reorganization within the meaning of this section * * * (3) shall provide adequate means for the execution of the plan, which may, *as far as may be consistent with the provisions of sections 1 and 5 of the Interstate Commerce Act as amended,* include the transfer or conveyance of all or any part of the property of the debtor to another corporation or to other corporations or the consolidation of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other railroad corporation * * *. (Italics ours.)

and

> (e) * * * Upon acceptance of the plan in accordance with the provisions of this subdivision (e) the commission may, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, or consolidation or merger of properties, to the extent contemplated by the plan *consistent with the purposes of the Interstate Commerce Act as amended.* * * * (Italics ours.)

4. Section 77 of the Bankruptcy Act, as amended and rewritten by the Act of August 27, 1935, 49 Stat. 911, 11 U.S.C. § 205, and particularly—

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The combined "consistency clause" of subdivision (f) thereof, as follows:

> (f) * * * Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, *transfer of any property, sale, consolidation or merger of the debtor's property,* or pooling of traffic, to the extent contemplated by the plan *and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended.* * * * (Italics ours.)

(NOTE: The above is copied from 49 Stat. 911. In 11 U.S.C. § 205, the wording of the last clause is changed, without change of meaning, to read: " * * * and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended.")

and the so-called "cram-down" clause of subdivision (e) thereof, as follows:

> * * * *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, *the judge may nevertheless confirm the plan* if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e). * * * (Italics ours.)

STATEMENT OF THE CASE

To avoid duplication, these petitioners adopt all details of the statement of the case made in the separate brief of petitioners, St. Joe Paper Co., *et al.,* not here set out. This separate statement in this brief undertakes to make clear: (1) who these petitioners are and their interest and standing in the case; (2) that the question to which the

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writ of certiorari limits review in this Court is the question which these petitioners have principally pressed upon the courts below; and (3) how the courts below have dealt with that question.

1. These Petitioners—Their Interest and Standing

Southern Railway System and Affiliated Lines (being the separate but affiliated railroad corporations listed below,[1] herein and throughout this litigation referred to as "Southern") are interstate railroads in the Southeast in competition with respondent, Atlantic Coast Line, and in competition with their co-petitioner "Seaboard."

Seaboard Air Line Railroad Company (herein and throughout this litigation referred to as "Seaboard") is an interstate railroad in the Southeast in competition with respondent, Atlantic Coast Line, and in competition with its co-petitioner "Southern."

Southern, Seaboard and Atlantic Coast Line each connects with debtor's railroad, Florida East Coast, at its northern terminus at Jacksonville, Florida, at which point the three—Southern, Seaboard, and Atlantic Coast Line—vigorously compete with each other for the interchange of interstate traffic with Florida East Coast both northbound and southbound.

Neither Southern nor Seaboard has sought to acquire the properties of debtor, Florida East Coast, a railroad whose main line runs between Jacksonville on the north along the east coast of Florida and a point a little south of Miami. But throughout this litigation Southern and Seaboard have opposed the acquisition of the Florida East Coast Railroad by respondent, Atlantic Coast Line, and particularly have opposed, before the Commission and be-

[1] Southern Railway Company; Georgia Southern and Florida Railway Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; New Orleans and Northeastern Railroad Company; The Alabama Great Southern Railroad Company; and St. Johns River Terminal Company.

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fore the courts below, the forced merger or consolidation of Florida East Coast with respondent, Atlantic Coast Line, under the guise of a plan for reorganization of that "debtor" under Section 77 of the Bankruptcy Act, as amended by the Act of August 27, 1935, 49 Stat. 911, and specifically have contended, before the Commission and the courts below, that Section 77, as so amended, gives no power to the Commission, or to the courts below, or to the Commission "brigaded" with the said courts, to coerce such an involuntary merger or consolidation over the opposition of the great majority of the equitable owners of the debtor.

Neither Southern nor Seaboard owns any of the securities of the debtor, Florida East Coast, and neither has, therefore, had standing in this litigation to attack the fairness or equitableness of the various plans for its reorganization, a question not now under review by this Court, under the writ of certiorari which it has granted.[2] But Southern and Seaboard, both of whom will be seriously injured in their respective competitive positions at Jacksonville if the Commission's forced merger plan is approved, have intervened before the Commission and before the District Court below to protect their said competitive positions and to challenge the basic statutory power to certify and approve the forced merger plan, which would give the Florida East Coast to their competitor, Atlantic Coast Line, a plan by which Southern and Seaboard would suffer grave *damnum* as well as *injuriam* if the plan is, as they contend, illegal for want of statutory power.

At no stage of the litigation has respondent, Atlantic Coast Line, challenged the right of Southern or of Sea-

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[2] *St. Joe Paper Co. et al.* v. *Atlantic Coast Line Railroad Co.*, No. 670; *Lynch et al.* v. *Atlantic Coast Line Railroad Co.*, No. 702; *Aird et al., Trustees* v. *Atlantic Coast Line Railroad Co.*, No. 705; *Welborn et al.* v. *Atlantic Coast Line Railroad Co.*, No. 710, 345 U.S. 948-949.

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board to intervene for this purpose or to present this contention.

The *damnum* to Southern and Seaboard if the decision of the Court of Appeals is affirmed and if the forced merger plan is approved, is sufficiently shown by the following finding by Circuit Judge Strum in the District Court below, who had before him the most up-to-date evidence on this question, and whose factual finding *quoad hoc* is unchallenged:[3]

> "Seaboard Air Line Railway and Southern Railway are competing carriers with Atlantic Coast Line from Jacksonville to the north, east, and central west. These roads now compete with A.C.L. for the interchange business of Florida East Coast at Jacksonville, through the Jacksonville 'open gateway' to and from the east coast of Florida. The public now enjoys the benefit of this competition. Seaboard parallels A.C.L. from many Florida points to Jacksonville, also from Jacksonville to Richmond, with the same connections to the north and east. Seaboard and Southern, one or both, serve substantially the same principal cities as A.C.L. to the north and west of Jacksonville. From the interchange traffic at Jacksonville, Southern Railway received in 1949 a total revenue of $5,900,000. The Seaboard received $3,300,000. These two lines aggregated $9,200,000, about 57% of the total interchange revenue, the Coast Line and its affiliates having received a total of approximately $7,450,000.
>
> "It is obvious that the addition of Florida East Coast to its system would give A.C.L. a tremendous advantage—to say the least of it—over its competitors, the Seaboard and Southern, as to passenger and freight traffic originating along, or destined to, the east coast of Florida and in Cuba. It would effectively close the 'open gateway,' which now exists at Jacksonville, and give A.C.L. a virtual monopoly over the interchange business at Jacksonville. Apparently the Commission saw no 'grave consequences' for the public in this situation. But it finds that because the duPonts control extensive banking resources in Florida—an advantage, it would seem, in operating a rail-

[3] *In re Florida East Coast Ry. Co.*, 103 F. Supp. 825, 845-846.

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road—their control over the operation of the F.E.C. would be incompatible with the public interest.

"It may be that the coercive possibilities which would accompany absorption of F.E.C. into the Atlantic Coast Line, along with sole ownership of P & O S/S Company, and the potential influence of that set-up upon passengers and shippers as to the carrier they would select to the north, east, or west of Jacksonville, served by A.C.L. and L. & N., would have consequences less 'grave' on the public interest than to entrust continued independent control to the present equitable owners of Florida East Coast, whose only disqualification is that some of them own a chain of Florida banks, but such a conclusion is wholly unsupported by evidence in this record. It should here be mentioned again that there are $20,000,000 of minority 5% bondholders who do not own any Florida banks, but who will nevertheless be penalized by the Commission's apprehensions as to the public interest.

"With some exceptions, a shipper has the theoretical privilege of routing his shipment as he wishes. As to broken lot shipments, this is a privilege rarely exercised. As to carload shipments, it will hardly be doubted that a shipper who endeavors to procure empty cars from one carrier to be loaded with shipments to be routed over the lines of a competing carrier will find his path beset with difficulties."

2. This Court Has Limited Its Review to the One Question of Statutory Power

By the certiorari which it granted in these cases, 345 U.S. 948-949, this Court has limited its review to the one question of statutory power, which Southern and Seaboard have stressed before the Commission and before the courts below.

3. How the Question of Statutory Power Has Been Dealt With Below

The specific question of statutory power here under review, having been decided against these petitioners twice by the Commission,[4] was by them presented twice in the

[4] 267 I.C.C. 295, 338-339; 267 I.C.C. 729, 730-735.

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District Court below and twice in the Court of Appeals below.

Our contention as to this question was fully sustained by Circuit Judge Sibley, sitting as judge designate in the District Court, in his opinion in 81 F. Supp. 926, 932, where he said:

> "It is very earnestly argued that Subsection b which gives the specifications for a plan, in saying it 'may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation,' etc., does not mean a forced merger, which the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq., has never permitted the Commission to compel, though Congress has often considered the matter. The history of the legislation in adopting Section 77 in 1933, is pointed to as showing that Congress was then concerned that no such thing was to be done under Section 77; and so again in 1935 when the section was revised; and that the reference to the Interstate Commerce Act in Subsection f which the Commission thinks applies only to its actions after confirmations of a plan, was intended to apply throughout and became accidentally misplaced in redrafting the Act. Without reciting the history, I think this contention is true. Of late years courts have perhaps gone too far in using legislative history in a very loose way to supplement or change an Act as written. If this question related directly to the liberties or property of the people I would be loath to do it now. But it relates to the extent of the power granted by Congress to its own agent. And the Interstate Commerce Act can be construed with Section 77 to ascertain what Congress really meant by a railroad 'merger or consolidation,' and whether it meant one consented to by both parties to it. No one would contend that the Coast Line could be forced. But the Commission argues that this debtor has also consented, because its stockholders have not appeared to object. I think that does not follow. It is expressly found that the debtor's insolvency is such that the stockholders are not interested parties. The debtor,

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> its property and affairs now belong in equity to the creditors, and more specifically to the refunding bondholders. The full jurisdiction and control over them is in this court. The refunding bondholders by an overwhelming majority do not consent. If the court has the power as a court of bankruptcy to consent for them, under the circumstances of this case it should refuse to do so. I do not think Congress intended to force a merger undesired by the majority in amount of the affected parties by permitting a merger to be part of a plan. This conclusion makes it unnecessary to determine whether the court's power in bankruptcy could be extended to force a merger consistently with the Fifth Amendment. It also ends this plan. * * *"

On appeal from Judge Sibley's decision, a majority of the Court of Appeals affirmed his disapproval of the plan as unfair and inequitable and specifically said, "We agree with the trial judge that upon the facts of record and his findings, and in the light of the determination of the commission, *such a forced merger as is now proposed is contrary to the statute.*" (Italics ours.) This was the holding of Chief Judge Hutcheson, the author of the opinion, joined in by Judge Russell in his special concurring opinion. 179 F. 2d 538, 544.

However, a different majority of the Court of Appeals, this time Judges Hutcheson and Holmes, Judge Russell disagreeing in his special concurring opinion, held against our contention on the question of statutory power, saying:

> "We are in no doubt, however, that a plan providing for what the trial judge broadly called a 'forced merger', that is, a merger over the objection of the debtor and all its creditors, might be lawfully certified to the court and lawfully approved and confirmed by it." (P. 544.)

and further saying:

> "In remanding the case, however, for further proceedings, we remand it for the purpose of working out a really fair and equitable plan and without preju-

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> dice in doing so to the due consideration of any fair and equitable plan for bringing this matter to an end, *including such a plan providing for a merger with, or sale to, the Coast Line either with or without the approval of the security holders.*" (P. 544.) (Italics ours.)

This holding, by Judges Hutcheson and Holmes, who interestingly enough completely disagreed with each other as to whether the then pending plan was unfair and inequitable, was made without any analysis of Section 77, without any consideration of the "provisions and purposes" of the Interstate Commerce Act or of the consistency clause of Section 77 requiring consistency with those provisions and purposes, and without any consideration at all of the illuminating legislative history of Section 77, upon which Judge Sibley had based his holding that Congress never intended to give to the commission the power to coerce a merger or consolidation. For all Judge Hutcheson's opinion shows, this holding by him and Judge Holmes was mere *ipse dixit* based on nothing more than the fact that they sat on a higher court with power to overrule Judge Sibley *quoad hoc*.[5]

Judge Russell vigorously disagreed with this *ipse dixit*, saying:

> "I concur in the judgment of affirmance, and think that in most respects the decision ably demonstrates the reasons why this should be so. However, since I am in complete accord with the conclusions reached, and expressed in his opinion, by the very able and distinguished Circuit Judge Sibley, who sat in the District Court as United States Judge Designate, I can not accept such contrary views as are expressed in the present [i. e., Judge Hutcheson's] opinion." (P. 545.)

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[5] Cf., Mr. Justice Jackson, separate opinion in *Brown v. Allen*, 344 U.S. 443, 540, decided February 9, 1953, "We are not final because we are infallible, but we are infallible only because we are final."

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The queer result was that the Court of Appeals, with its swing-shifting and alternating two-to-one majority, at the same time affirmed Judge Sibley's disapproval of the plan as unfair and inequitable but, with a shifted majority, overruled Judge Sibley on the basic question of statutory power and held that a forced merger was authorized.

At that stage, two Circuit Judges had held with us and two Circuit Judges had held against us on the question of statutory construction on which this Court has now granted certiorari.

When the fourth amended plan of reorganization, approved by the majority of the Commission, went back to the District Court, still providing for the forced merger or consolidation of the Florida East Coast with the Atlantic Coast Line, over the objection of the great majority of the equitable owners of the debtor, Florida East Coast, and over the objections of these petitioners, we again presented to Circuit Judge Strum, sitting as District Judge, *pro hoc vice,* our same contention that Section 77 of the Bankruptcy Act, as amended by the Act of August 27, 1935, 49 Stat. 911, had conferred no power on the Commission or on the court to approve a plan of reorganization providing for a forced merger of debtor, Florida East Coast, with the respondent here, Atlantic Coast Line. We recognized that Judge Strum might refuse to decide that question, feeling bound by the decision of the majority of the Court of Appeals against our contention in 179 F. 2d 538. Nevertheless, we presented our contention of want of statutory power as strongly as we could, as raising a serious question as to validity of the fourth plan, properly to be considered by Judge Strum in exercising his judicial discretion as to whether he would approve or disapprove that plan, even if he felt he could not decide the question of statutory power himself.

In his decision in 103 F. Supp. 825, 834, Judge Strum merely held, on our point, that it was the "settled law of this case" that a forced merger plan might lawfully be

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certified to the court by the Commission and might lawfully be approved and confirmed by the court, citing Judge Hutcheson's language to that effect in 179 F. 2d 538, 544. But he sustained other objections to the fourth amended plan, held it to be unfair and inequitable and, indeed, held that it was just as unfair and inequitable as the previous plan which Circuit Judges Sibley, Hutcheson and Russell had disapproved.

He went further and, in accordance with the specific authorization of Section 77, subdivision (e) and subdivision (g), dismissed the Section 77 bankruptcy proceeding and directed the restoration of all property and records of the debtor to equity receivership.

At that stage, Judge Strum not having decided our question himself but only having held himself bound on it by the "law of the case," of four Circuit Judges who had passed on our contention of want of statutory authority for a forced merger plan, two had held with our contention and two had held against it.

When respondent, Atlantic Coast Line, appealed from Judge Strum's decision to the Court of Appeals below, that court, on its own motion [6] and, apparently, because of its previous sharp divisions in this case, ordered that the appeal be heard before it sitting *en banc,* so that the appeal was heard before the full membership of the Court of Appeals below, with the exception of Circuit Judge Strum, from whom the appeal came and who was disqualified,[7] to-wit, before Circuit Judges Hutcheson (Chief Judge), Holmes, Borah, Russell and Rives, see 201 F. 2d x, 325.

In view of this enlarged personnel of the Court of Appeals sitting below, and invoking the holding by this Court in *United States* v. *U.S. Smelting Co.,* 339 U.S. 186, 199, that, unlike *res judicata* which is a binding rule of judgment, the rule of "the law of the case" is "only a discre-

[6] See *Western Pacific Railroad Case,* 345 U.S. 247, decided April 6, 1953.

[7] 28 U.S.C. 47.

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tionary rule of practice," we earnestly urged the Court of Appeals below to reexamine and redecide the fundamental question of statutory power as to forced merger and requested and secured permission to file with the court *en banc,* and did file with it, our brief before the Court of Appeals on the previous appeal (179 F. 2d 538), in which we had presented a full study of the legislative history of Section 77 of the Bankruptcy Act, as originally enacted in 1933 and as amended in 1935, supporting our contention that Congress not only had no intention but affirmatively denied any intention to confer on the Commission the compulsory merger or consolidation power which it had always denied and had since, in 1940, again denied to the Commission under the Interstate Commerce Act and its amendments.

The majority of three of the five Judges of the court below, in the opinion by Chief Judge Hutcheson, joined in by Judges Holmes and Rives, in 201 F. 2d 325-331, gave our contention on this basic question short shrift. They did not reconsider the question *de novo,* as we had urged, but held against our contention on the ground that the previous concurrence against us on the same question by Judges Hutcheson and Holmes (Judge Russell *contra*), in 179 F. 2d 538, had established the law of the case against our contention.

Circuit Judges Russell and Borah dissented, Judge Russell's opinion, joined in by Judge Borah, saying, as to our contention:

> "* * * The bald proposition established by the majority opinion is that the court's power in bankruptcy authorizes the taking, against the wishes of the overwhelming majority of the refunding bondholders [of the debtor, Florida East Coast], of their existing rights, requiring acceptance by them of an entirely different and unrelated security which they do not desire. This holding poses a serious constitutional question as to whether the court's power in bankruptcy could thus be extended to force a merger consistent

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with the Fifth Amendment. However, in my view of the case I do not reach the constitutional question because here it is clear from the history of the legislation of Section 77, that the Commission has undertaken to exercise a power which the Congress never intended to confer on the Commission. This was well pointed out by Judge Sibley in his decision while sitting as District Judge in a former proceeding in this matter. In re Florida East Coast Railway Co., D.C., 81 F. Supp. 926. This view was expressly approved by the writer in his special concurrence upon the former appeal of this case. Atlantic Coast Line v. St. Joe Paper Co., 5 Cir., 179 F. 2d 538, 545. It is reaffirmed today."

It results that, as the writs of certiorari bring this same question, and it alone, to this Court for review, it is a question of first impression here, on the merits of which three Circuit Judges, Sibley, Russell and Borah, have held with us, and two Circuit Judges, Hutcheson and Holmes, have held against us. Two other Circuit Judges, Strum, in the District Court, and Rives, in the Court of Appeals, have not passed on the merits of the question at all, but have merely bowed to the previous decision by Judges Hutcheson and Holmes as establishing the "law of the case," binding upon them as to this question.

SUMMARY OF ARGUMENT

I

Section 77, as Amended, on Its Face Shows That Congress Intended to Deny to the Commission the Compulsory Power Here Asserted, as It Had Always Been Denied Under the Interstate Commerce Act as Amended

The two "consistency clauses" of subdivisions (b) and (e) of Section 77 as enacted in 1933 clearly denied this compulsory power to the Commission.

The amendatory Act of 1935 combined those two "consistency clauses" of 1933 into one clause in subdivision (f), expressly requiring any Commission-approved plan

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for merger or consolidation to be consistent not only with the "provisions" but also with the broad "purposes" of the entire Interstate Commerce Act as then or as later amended.

The "cram-down" provision of subdivision (e), written into Section 77 by the amendatory Act of 1935, gave no power whatsoever to the Commission, but only gave an ultimate procedural power to the district judge to make effective a Commission-approved plan, required by the "consistency clause" to be voluntary on the part of both railroads to be consolidated.

The "cram-down clause" cannot be held to negative the prohibition of the consistency clause denying to the Commission the compulsory power here claimed.

If all this be not clear from the face of Section 77, then we have a highly ambiguous situation, with glaring conflict between the "consistency clause" and the "cram-down clause," inviting, indeed requiring, resort to legislative history to ascertain the real intent of Congress.

II

In Writing the 1935 Amendments to Section 77 of the Bankruptcy Act, Congress Did Not Write on a Clean Slate, But as a Postscript to a Long Series of Enactments Dealing With Railroad Consolidations and Mergers, Throughout the Whole History of Which, and Even as Late as 1940, It Had Consistently Refused to Grant Any Power of Compulsion to the Commission

Section 77 must be construed in the light of the long history of the separate enactments constituting the Interstate Commerce Act. *United States* v. *Barnes*, 222 U.S. 513, 520; *United States* v. *Sweet*, 245 U.S. 563; *Lauritzen* v. *Larsen*, 345 U.S. 571, decided May 25, 1953.

Prior to the enactment of the Sherman Act in 1890 *laissez faire* was the federal governmental policy regarding consolidation of railroads, and that was the great era of free consolidations. Thereafter, far from attempting

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to force consolidations, the federal government prevented them, by suits under the Sherman Act, where they would result in the elimination of competition.

Throughout the long history of federal legislation regulating railroads, since the enactment of the original Act to Regulate Commerce in 1887, Congress has always and consistently denied to the Commission any compulsory power to force railroad consolidations or mergers. It denied such power in 1920, in 1933, and again in 1940, five years after Section 77 was amended in 1935, and still the Commission has no such compulsory power under the Interstate Commerce Act and has only the power to approve or disapprove consolidations or mergers voluntarily agreed to and proposed by both railroad parties. *Schwabacher* v. *United States*, 334 U.S. 182, 193.

It cannot be held that by oversight, and with no discussion or mention of the matter in the legislative proceedings, Congress had given to the Commission in 1935 the very compulsory power which it had always denied to it theretofore and again denied to it in 1940, five years later.

III

The Legislative History of Section 77, as Enacted in 1933 and as Amended in 1935, Makes It Clear That the "Consistency Clauses" Were Written Into the 1933 Act and Combined and Continued in the Act of 1935 for the Very Purpose of Denying to the Commission the Compulsory Power Which Had Always Been Denied to It Under the Interstate Commerce Act

The "consistency clauses" of both acts originated with Mr. Joseph B. Eastman, Chairman of the Legislative Committee of the Commission, and were proposed by him for the very purpose of avoiding the possibility that the merger and consolidation powers of the Commission under the Interstate Commerce Act might be expanded by the enactment of, and under, Section 77.

It is clear from the legislative history of Section 77, as originally enacted in 1933 and as amended in 1935, that

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Congress adopted the "consistency clause" for the very intent and purpose suggested by Mr. Eastman. The intent of Mr. Eastman, the intent of his counsel who drafted the legislation, and the intent of the legislators are all shown to have concurred in this purpose.

The compulsory power claimed by the Commission cannot be derived from an absence of express prohibition in the Interstate Commerce Act itself. The fact that Congress refused to grant that power under that Act in 1920, in 1933, and in 1940 is controlling.

IV

The Legislative History of the Act of 1935 Makes It Clear That by the "Cram-Down" Provision of the Provisos of Subsection (e) Congress Did Not Intend to Nullify the "Consistency Clause" and to Give to the Commission or to the Courts the Compulsory Power Which It Has Always Refused to Give Under the Interstate Commerce Act

The "cram-down clause" gives no power at all to the Commission. It only gives an ultimate coercive power to the judge, on final confirmation, to prevent a dissident minority of the debtor's security-holders from blocking, without reasonable justification, or from "highjacking" for ulterior motives, a fair and reasonable plan approved by the majority.

Any other construction of the "cram-down clause" would raise a serious constitutional question under the Fifth Amendment and should, hence, be avoided.

The legislative history, showing the reasons for enacting that provision and the limited application intended to be given to it, confirms the construction of it for which we contend.

The decision by Circuit Judge Sibley in this regard, in 81 F. Supp. 926, 932, concurred in by Circuit Judge Russell in 179 F. 2d 538, 545, and by Circuit Judges Russell and Borah in 201 F. 2d 325, 331-332, should be followed by this Court.

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Conclusion

This Court should reverse the judgment of the court below.

ARGUMENT

I

Section 77, as Amended, on Its Face Shows That Congress Intended to Deny to the Commission the Compulsory Power Here Asserted, as It Had Always Been Denied Under the Interstate Commerce Act as Amended

There were two "consistency clauses" in the original Section 77, amending the Bankruptcy Act so as to make it apply to reorganization of railroads, as enacted by the Act of March 3, 1933, 47 Stat. 1474.

The first was in subdivision (b) of Section 77 and it limited Commission-approved plans for reorganization of debtor railroads providing for their merger or consolidation with another railroad or other railroads to plans consistent with the *provisions* of the Interstate Commerce Act, in the following terms:

> "(b) A plan of reorganization within the meaning of this section * * * (3) shall provide adequate means for the execution of the plan, which may, *so far as may be consistent with the provisions of sections 1 and 5 of the Interstate Commerce Act as amended,* include the transfer or conveyance of all or any part of the property of the debtor to another corporation or to other corporations or the consolidation of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other railroad corporation and the issuance of securities of either the debtor or any such corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; * * *." (Italics ours.)

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The second "consistency clause" was contained in subdivision (e) of the 1933 Act, requiring consistency with the "purposes" of the Interstate Commerce Act, as follows:

> "(e) * * * Upon acceptance of the plan in accordance with the provisions of this subdivision (e) the commission may, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, or consolidation or merger of properties, to the extent contemplated by the plan *consistent with the purposes of the Interstate Commerce Act as amended.* * * *" (Italics ours.)

Obviously the requirement of subdivision (e) of consistency with the "purposes" of the entire Interstate Commerce Act was broader than the requirement of subdivision (b) of consistency with the "provisions" of only two sections of that Act. Yet the later and broader expression fortified the earlier and narrower, and the fact that Congress was at pains in 1933 to require consistency twice, in two subdivisions of Section 77, emphasized the requirement that consolidation or merger plans must be consistent, not only with the literal "provisions" but also with the broad "purposes" of the Interstate Commerce Act.

It has never been contended by respondent that Section 77 as enacted in 1933 conferred any compulsory power on the Commission with reference to consolidation or merger of debtor railroads. In fact, in his argument to the Commission in the proceeding culminating in its Fourth Supplemental Report, 267 I.C.C. 729, Mr. Edward W. Bourne, then and now leading counsel for respondent, expressly declared to the Commission that at the time the 1933 Act was passed, Congressman Rayburn was entirely right in stating that nobody intended to extend the power to have compulsory consolidations; that "the whole 1933 Act was a consent Act"; that there was no grant of any compulsory

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power by the 1933 Act; but that it was the 1935 amendatory Act that brought in the provision for asserted compulsory power upon which he and respondent relied[8] (*i.e.*, the "cram-down" provision of subdivision (e) of the Act of 1935, upon which respondent, the Commission, and apparently the Court of Appeals below have solely relied).

But the two consistency clauses of the Act of 1933 were, in the amendatory Act of August 27, 1935, 49 Stat. 911, combined into one clause containing both the narrower requirement of consistency with the "provisions" and the broader requirement of consistency with the "purposes" of the Interstate Commerce Act, and, as a matter of draftsmanship, this new, combined consistency clause was placed in subdivision (f) of Section 77, as follows:

> "* * * Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan *and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended.* * * *" (Italics ours.)

As Section 77, as amended in 1935, is carried in 11 U.S.C. 205(f) the combined and reiterated consistency clause is in exactly the same words as in 49 Stat. 911, save for a purely technical change in the statutory reference, involving no change in meaning, to make it read:

> "and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended."

Thus, in the amending Act of 1935, Congress made it clear that it was requiring consistency both with the "provisions" and the "purposes" not merely of Sections 1 and 5 of the Interstate Commerce Act, but of that entire

[8] See Transcript I.C.C. Finance Docket 13170, pp. 5202-3, not printed but lodged with the Clerk of this Court.

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Act, and not merely of that Act as amended up to August 27, 1935, but as it might be "hereafter amended." The combining and repetition of the two "consistency clauses" of the original Act of 1933 and the care with which Congress made that requirement for consistency extend to any future amendments of the Interstate Commerce Act constitute an express declaration of legislative intent than which nothing could have been clearer.

However, because the Congress, in the amendatory Act of 1935, wrote into subdivision (e) of Section 77, as one of a number of provisos in that long, procedural subdivision, a clause generally referred to by the expressive term "the cram-down clause," the respondent contends, the Commission held[9] (and frankly we do not know what was the basis of the holding to the same effect by Judges Hutcheson and Holmes in the Court of Appeals below), that that "cram-down clause" nullifies the later "consistency clause" of subdivision (f) of that Act and expresses a congressional intent to grant to the Commission and the courts a forced merger or consolidation power which, otherwise, the "consistency clause" clearly negatives. The broad catholicity of language of that "cram-down clause" is as follows:

> "* * * *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e). * * *"[10]

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[9] 267 I.C.C. 295, 338-339; 267 I.C.C. 729, 730-735.

[10] 49 Stat. 911, 11 U.S.C. 205, subdivision (e).

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It will at once be observed that, while the "consistency clause" of subdivision (f) is in direct and express term a limitation on the power of the *Commission* in formulating and approving any plan involving a merger or consolidation, the "cram-down clause" of the preceding subsection (e) does not refer to or purport to confer any power on the Commission, but only applies to "the judge" and gives him a power, to be exercised only in the latest stage of the proceeding, after the Commission has approved a plan and certified it to the District Court, after that court has approved the plan, after all judicial review has been exhausted and the plan stands finally approved by the court, after the approved plan has been sent back by the court to the Commission for the purpose of its polling the security-holders of the debtor, after that poll has been taken, and after the Commission has certified back "to the judge the results of such submission."

Then, and then only, after all the quasi-judicial and all the merely ministerial functions of the Commission have been completed, the "cram-down clause" gives to "the judge," not to the Commission, a power to "cram" the plan down the throat of some recalcitrant somebody. *Quaere:* down whose throat?

Respondent has argued and undoubtedly will argue that this ultimate coercive power granted only to the judge in this final confirmation stage of the Section 77 proceeding, reflects back, by some strange misapplication of the laws of physics or logic, to relieve the Commission of the express limitation on its power, in the early stage of the proceeding, requiring any plan involving merger or consolidation approved by it to be consistent with the provisions and purposes of the Interstate Commerce Act as amended on August 27, 1935, or as it might be thereafter amended.

It was on just such a queer theory of a power given to the judge, in the latest stage, reflected backward in space and time to shine on the Commission in the earliest stage,

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that the Commission held [11] that it had the power to force a merger or consolidation, in spite of the "consistency clause" of subdivision (f) which was expressly written by Congress as a limitation on the powers of the Commission itself, and in spite of the fact that the great majority of the equitable owners of Florida East Coast were before the Commission as parties vigorously opposing the plan for a merger of its properties with Atlantic Coast Line.

If we may try to give our opponent's argument its fairest extent, why should it not be held that the Commission has the coercive power to impose a non-voluntary merger or consolidation in its original formulation and approval of a plan, since, in any event, Congress has given to the judge in the last stage a power of compulsion to cram the plan down the throats of recalcitrants?

There are a number of clear and short answers.

First: It is one thing for Congress to give an ultimate power of compulsion to a federal district judge. It is quite another thing to give such a power of compulsion originally to a quasi-legislative, quasi-judicial, bipartisan Commission.

Second: Congress has the power, under constitutional limitations, to give a power to a federal district judge which it denies to an administrative Commission. It clearly denied the power to the Commission by the "consistency clause" of subdivision (f), whatever be the exact power of compulsion it may have given to the judge by the "cram-down clause" of subdivision (e). The Commission cannot claim and exercise a power expressly denied to it merely because Congress saw fit to give such a power to the district judge.

Third: As a very practical answer, we say that, assuming that Congress by the "consistency clause" intended, as we think it clearly did, to deny to the Commission any compulsory power to force a merger or consolidation, then the

[11] In 267 I.C.C. 295, 338-339; and in 267 I.C.C. 729, 730-735.

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Commission could not, in a case like this, approve a plan or a merger or consolidation over the vigorous objection of a great majority of the owning security-holders of a debtor. Therefore, no such *ab initio* forced merger plan could ever reach the judge in the final confirmation stage and the judge could never have an opportunity to apply his "cram-down" power under subdivision (e) to such a plan.

The third answer must have been in the minds of Congress when it denied compulsory power to the Commission and granted it to the judge. As we shall show in Point II, Congress has always denied the compulsory power over mergers and consolidations to the Commission in the Interstate Commerce Act. *Quoad* railroad mergers and consolidations, Section 77 as amended is exactly *in pari materia*. "Consistently" Congress denied the compulsory power to the Commission by the "consistency clause" of Section 77. It must have had some other purpose in mind in giving a certain compulsory power to the judge by the "cram-down clause."

The legislative history of Section 77 will give the clear answer as to what that purpose was. It will make clear, see Point III, that the "consistency clause" was written in for the very purpose of denying to the Commission the compulsory power always denied to it in the Interstate Commerce Act; that thereby Congress intended to deny to the Commission any power to approve a plan for merger or consolidation over the objection of the great majority of the debtor's equitable owners and that no such plan could ever get to a judge; that the "cram-down clause" was inserted to give to the judge, on final confirmation, the power to coerce *recalcitrant minorities* who might try to exercise "hold-up" tactics in the final stage to block, without any reasonable justification, a plan including merger or consolidation agreed to by the majority of the security-owners. See Point IV, *infra*.

At any event, if our contention as to the construction of

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the statute be not clearly right on the face of the language of Section 77, then we have a most ambiguous statutory situation, a clear conflict between the "consistency clause" and the "cram-down clause," which invites, nay demands, a careful examination of the legislative history to ascertain the true congressional intent.

II

In Writing the 1935 Amendments to Section 77 of the Bankruptcy Act, Congress Did Not Write on a Clean Slate, But as a Postscript to a Long Series of Enactments Dealing With Railroad Consolidations and Mergers, Throughout the Whole History of Which, and Even as Late as 1940, It Had Consistently Refused to Grant Any Power of Compulsion to the Commission

As Judge Sibley well said,[12] "the Interstate Commerce Act can be construed with Section 77 to ascertain what Congress really meant by a railroad 'merger or consolidation', and whether it meant one consented to by both parties to it."

This Court very recently had occasion to construe and apply the broad catholicity of "all-comprehending words" of a 1920 amendment to the shipping laws, a long, historical series of enactments quite comparable to the Interstate Commerce Act, and it held that such a partial or amendatory Act must be construed in the light of the long history of that legislative patchwork of separate enactments, *Lauritzen* v. *Larsen*, 345 U.S. 571, 577, decided May 25, 1953, where it was said:

> "But Congress in 1920 wrote these all-comprehending words, not on a clean slate, but as a postscript to a long series of enactments governing shipping. All were enacted with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to deal with admiralty problems in reconciling our own with foreign interests and

[12] 81 F. Supp. 926, 932.

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in accommodating the reach of our own laws to those of other maritime nations.

"The shipping laws of the United States, set forth in Title 46 of the United States Code, comprise a patchwork of separate enactments, some tracing far back in our history and many designed for particular emergencies."

Accordingly this Court construed the 1920 Act in the light of that long patchwork of separate enactments on the same subject-matter.

Lauritzen v. *Larsen* was a very recent application of an old and well-settled rule of construction. In *United States* v. *Barnes*, 222 U.S. 513, 520, this Court said:

> "Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this Court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears."

In *United States* v. *Sweet*, 245 U.S. 563, this Court had to construe a statute in which Congress granted to the then new State of Utah certain designated sections of public lands. The Act contained no reservation of mineral lands to the United States. But the whole course of congressional legislation with reference to public lands showed that the settled policy of Congress was for the United States to retain title to mineral lands. Holding that mineral lands did not pass to Utah under the statute making the grant, this Court said:

> "Although couched in general terms adequate to embrace such lands if there were no statute or settled policy to the contrary, it contains no language which explicitly or clearly withdraws the designated sections, where known to be mineral in character, from the oper-

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> ation of the mining laws, or which certainly shows that Congress intended to depart from its long prevailing policy of disposing of mineral lands only under laws specially including them. It therefore must be taken as neither curtailing those laws nor departing from that policy." (Pp. 572-573.)

These cases are squarely applicable here. Section 77 of the Bankruptcy Act, as enacted in 1933 and as amended in 1935, was not written on a clean slate, but as a postscript to a long series of enactments for the regulation of railroads and, since 1920, specifically governing mergers and consolidations of railroads. It will not do to say that it was not a postscript to the long series of enactments comprising the Interstate Commerce Act merely because it was in form of an amendment of the Bankruptcy Act rather than of the Interstate Commerce Act. Section 77 was squarely *in pari materia* with the "patchwork of separate enactments" comprising the Interstate Commerce Act as amended, a "code," or systematic collection of general rules dealing with a general subject. Section 77 took the form of an amendment to the Bankruptcy Act, rather than that of an amendment to the Interstate Commerce Act, merely because by it Congress was using its bankruptcy power under the Constitution to implement and supplement its general regulation of railroads under the commerce power.

Manifestly, Section 77 must be construed in the light of the long history of the enactments comprising the Interstate Commerce Act. The broad and general language of the "cram-down clause" cannot properly be construed to set aside and reverse the historical policy against compulsory railroad consolidations, especially since Congress, by the "consistency clause" of Section 77 as amended, obviously intended to reaffirm that policy.

If the Commission was given the power it claims and now claimed for it, by the 1935 amendment of Section 77, it is passing strange that no mention of that fact was made

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in all the plenitude of discussions of railroad mergers and consolidations prior to and during the enactment of Transportation Act, 1940. In that enactment, five years after the amendment of Section 77 in 1935, Congress again rejected, as it always had done, all suggestions that it give to the Commission any compulsory power to force railroad mergers or consolidations.

If the Commission, as now contended, already had that power by virtue of the 1935 amendment to the Bankruptcy Act, the Commission, the Federal Coordinator of Railroads (Mr. Eastman), railroad labor, railroad management, and the Congress itself were all strangely ignorant of the fact.

The subject of railroad consolidations has long been one of intense interest to Congress, the courts, and students of transportation. Through the years Congress had deliberately, and after fullest discussion and debate, matured the present federal policy concerning railroad consolidation. That policy has always been formulated under the commerce power—not under the bankruptcy power. It is now set out in carefully detailed provisions of the Interstate Commerce Act. A study of the evolution of the policy powerfully reinforces the argument we have already made, that Congress did not, by the 1935 amendment to the Bankruptcy Act, undertake to make the major change in federal law relating to railroad consolidations which a majority of the Commission in this case has held that it did, and upon which the Coast Line now insists.

Most of the railroads of the United States originally were local enterprises, designed to accommodate the immediate commercial needs of the communities they served. Their local character was reflected in the large number of separate companies; there once were more than 6,000 separate railroad companies.[13] From the 50's of the last century on, there was an accelerated tendency of the railroads to consolidate into larger units. This process resulted in

[13] Bird M. Robinson, in *Proceedings of the Academy of Political Science*, XIII 418.

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the formation of the existing large railroad systems. Until almost the end of the century, there were no restrictions in federal law upon this process of consolidation. The federal policy was *laissez faire.*

In 1887 Congress made a profound change in its policy with regard to railroads generally when it enacted the Act to Regulate Commerce, 24 Stat. 379, thereby for the first time subjecting carriers by railroad to federal regulation. But that Act, although it prohibited certain cooperative arrangements between competing carriers, known as pooling contracts, did not undertake to prohibit or regulate consolidations.

In 1890 Congress enacted the Sherman Antitrust Act prohibiting contracts, combinations and conspiracies in restraint of trade and commerce, 26 Stat. 209. It was widely believed at the time that this Act did not apply to railroads. This view was dispelled in 1897 and 1898 by the decisions of this Court in *United States* v. *Trans-Missouri Freight Asso.*, 166 U.S. 290, and *United States* v. *Joint Traffic Association,* 171 U.S. 505, which held that railroads were subject to the Sherman Act and that agreements among competitive railroads fixing rates were unlawful. In a series of subsequent cases it was held that the consolidation of railroads between which any substantial competition existed was violative of the Sherman Act. *Northern Securities Company* v. *United States,* 193 U.S. 197; *United States* v. *Union Pacific Railroad Company,* 226 U.S. 61; *United States* v. *Southern Pacific Company,* 259 U.S. 214. This drastic change in federal policy towards consolidations, from one of complete *laissez faire* to one of virtual interdiction, put an end to the era of consolidations.

In 1919 and 1920 Congress exhaustively considered legislation to terminate the wartime federal control of the railroads, to return the railroads to their owners and to revise the Act to Regulate Commerce. No subject was given more extensive consideration at that time than that of railroad consolidation. At the request of the Senate Committee on

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Interstate Commerce, Commissioner Clark presented a statement of the Commission's views with respect to the proposed legislation. In this statement it was said:

> "Elimination of wasteful or unduly expensive competition in rates or service is desirable and * * * carriers might well be permitted and encouraged to coordinate their activities and merge or consolidate their lines to such an extent as is, after thorough investigation and full hearing, sanctioned by the regulating body."[14]

Congress was confronted with three possible policies in dealing with consolidations. It could: (1) continue the existing stringent prohibition; or (2) provide for voluntary consolidation subject to the approval of the Interstate Commerce Commission; or (3) authorize consolidations to be required by public authority. The bill which passed the Senate created a Board of Transportation having certain regulatory functions. One of these functions was to prepare a plan for the consolidation of all the railroads in the country into twenty to thirty-five systems. The Senate bill provided that if the railroads failed voluntarily during a period of seven years to consolidate in conformity with the plan, the Board of Transportation should have authority to compel them to do so. Congressional Record, Vol. 59, 3326-3327. The House rejected the principle of compulsory consolidation. Its committee reported a bill which permitted voluntary consolidation when authorized by the Commission. (House Report No. 456 of Nov. 10, 1919, pp. 6-7.) The committee said:

> "The pending bill favors permissive consolidation subject to approval by the Interstate Commerce Commission. * * * In our opinion, the interests of the public will be better served where the consolidations are voluntarily entered into, upon approval by the Interstate Commerce Commission, * * *."

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[14] 33 Ann. Rep. Interstate Commerce Comm. (1919) 4.

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The House passed the bill in the form recommended by its committee, and in conference "the Senate receded from the provisions for compulsory consolidation" in its bill. Conference Report on H.R. 10453, 66th Congress, pp. 63-64.

As finally enacted, the Transportation Act, 1920 (41 Stat. 456, 481), provided, in what became Section 5 of the Interstate Commerce Act, that the Commission should as soon as practicable prepare and adopt a plan for the consolidation of the railroads into a limited number of systems (paragraph 4). It provided that two or more railroads might, with the authority of the Commission, consolidate their properties into one corporation for ownership, management and operation, but that such consolidation must be in harmony with the Commission's plan for general consolidation (paragraph 6). It also provided that a railroad might acquire control of another railroad by lease or purchase of stock "or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation," with the approval of the Commission (paragraph 2). Thus after full consideration of the subject Congress in 1920 deliberately rejected the principle of compulsory consolidation, and in its stead adopted a policy which "favors permissive consolidation subject to the approval by the Interstate Commerce Commission." Subsequent history shows that this policy, although often assailed by proponents of compulsory consolidation, has been steadfastly maintained and reaffirmed.

Pursuant to the requirement of paragraph (4) of Section 5, the Commission in 1921 promulgated a tentative plan for the consolidation of all the railroads into a limited number of systems. *Consolidation of Railroads*, 63 I.C.C. 455. However, the Commission was of the opinion that the requirement of paragraph (4) of an over-all plan for consolidation was impracticable. In its Annual Report for 1925 and for each of the three following years, the Commission recommended that it be relieved of the duty of prescribing such a plan. But the law was not changed, and

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in 1929 the Commission formulated a final plan for consolidation of the railroads into a limited number of systems. *Consolidation of Railroads,* 159 I.C.C. 522. The Commission said of this plan in its Annual Report for 1938 (p. 15) that "it evidently has not been attractive enough to managements and controlling interests to impel much voluntary action, and hence it has never been carried to fruition, although there has been some measure of accomplishment."

Many students of the subject thought that the Commission should be empowered to compel railroad consolidations. See, for examples, I. L. Sharfman, *The American Railroad Problem* (1921), pp. 237-238; H. G. Moulton and Associates, *The American Transportation Problem* (1933), p. xxvi. Although in the Emergency Railroad Transportaton Act, 1933 (48 Stat. 217), Congress extensively overhauled the consolidation provisions of the Interstate Commerce Act, it failed to make any provision whatever with respect to compulsory consolidations; instead, it retained intact the policy of permissive consolidations.

In its Annual Report for 1938, the Commission gave a thoughtful discussion of the whole subject of railroad consolidation (pp. 14-17, 22-23). It stated its belief that further progress toward consolidation was desirable. But it did not recommend that it be given power to compel consolidations, nor did it suggest that it already had that power in the case of the large number of railroads then being reorganized under Section 77 of the Bankruptcy Act.

In 1939-1940, Congress undertook an extensive revision of the Interstate Commerce Act, which eventually resulted in the Transportation Act, 1940 (54 Stat. 898, 905). When considering this legislation Congress had before it the report of a committee known as the "Committee of Six" which had been appointed by the President in 1938 to study railroad problems. This committee consisted of three leaders of railroad labor and three railroad executives. Its

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report considered and rejected the idea of compulsory consolidation.[15] It said:

> "We do not think the country is ready for any compulsory system of consolidations. Whether ultimate resort must be had to the principle of compulsion is a question which we think it better to defer until after there has been an opportunity to see what can be accomplished if the railroads are relieved from these limitations and restrictions. In our opinion the best results will be achieved by leaving all initiative in the matter to the railroads themselves * * *." (p. 31).

Congress also had before it at this time a report of a committee of three members of the Interstate Commerce Commission whom the President had requested to study and make recommendations with reference to railroad legislation. This report was transmitted to Congress by the President with his message of April 11, 1938. In its report this committee referred to the fact that the Federal Coordinator of Transportation in his fourth report had presented a draft of legislation designed to correct certain weaknesses in the law regulating railroads as it then existed (House Document No. 394, 74th Cong., 2d Sess., App. C). The Committee of Three's report said with reference to the Coordinator's draft:

> "It would also give the Commission authority, through resort to the power of eminent domain, to require a unification, where it is sought by at least one carrier. * * *" (House Document No. 583, 75th Cong., 3d Sess., p. 39.)

It will be noted that the Coordinator proposed that Congress give the Commission the specific authority which it has assumed to exercise in the case at bar—the power

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[15] This report "is considered part of the legislative history of the Transportation Act of 1940." *Schwabacher* v. *United States*, 334 U.S. 182, 193 (footnote 12) (1948).

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"to require a unification, where it is sought by at least one carrier," as the Coast Line here seeks to force a unification against the will of the owners of the East Coast. But the Committee of Three failed to recommend enactment of this proposal, and Congress did not enact it.

The bill which was considered by the Senate Committee on Interstate Commerce (S. 2009, 76th Cong.) contained a provision eliminating the requirement then contained in Section 5 of the Interstate Commerce Act that the Commission must promulgate a master consolidation plan for all the railroads, to which any specific consolidation subsequently approved by it must conform. This followed the repeated suggestions of the Commission for elimination of this provision, as being impracticable and unworkable.

At the hearings before the Senate Committee, a spokesman for the Brotherhood of Railroad Trainmen stated the opposition of his organization to any amendment that would compel consolidations. The Chairman of the Committee, Senator Wheeler, reassured him:

> "Of course, as you well know, some people maintain that we ought to give the Interstate Commerce Commission the power to force consolidations.
>
> "There is a very strong sentiment on the part of a great many people that consolidation should be compelled. They say that nothing will be done until such time as that happens.
>
> "The railroad executives do not want forced consolidation; they are opposed to it. The railroad men are opposed to it, generally speaking.
>
> * * *
>
> "After all, when you speak of that, the Interstate Commerce Commission has studied it for years, and no consolidation can take place under this bill until such time as it is a voluntary consolidation." (Hearings on S. 1310, S. 2016, S. 1869, and S. 2009, 76th Cong., 1st Sess., 1939, p. 391).

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Again, the Chairman said:

> "As a matter of fact, much of the objection to this bill on the part of a number of people has been that it has not got some provision in it making it easier for consolidations; as a matter of fact, forcing consolidations and coordinations, or at least setting up in the Interstate Commerce Commission a committee that will go ahead and suggest how consolidations ought to be made.
>
> • • •
>
> "I have repeatedly said that you could not get a bill to force consolidations, or to have in here a provision that the Commission should have an opportunity of carrying on investigations of the subject to try to force consolidations, and so forth. So, as far as this committee is concerned, with reference to this bill, you are just wasting our time in talking about consolidations, because that subject is out the window." (*Id.* at 395.)

It is evident that Senator Wheeler, the Chairman of the Senate Committee on Interstate and Foreign Commerce, who so emphatically opposed authorizing the Commission even to investigate the subject of forced consolidations, would have been shocked at any suggestion that the Commission already possessed plenary power to force the consolidation of the large number of railroads then undergoing reorganization under Section 77 of the Bankruptcy Act as amended in 1935.

As finally enacted, the Transportation Act, 1940, repealed those provisions of Section 5 of the Interstate Commerce Act which directed the Commission to prepare and adopt a plan for the consolidation of railroads into a limited number of systems, and to determine whether any particular proposed consolidation was in harmony with such plan. Section 5, as amended in 1940, retains and strengthens the policy of permissive consolidation which had been adopted in 1920. Indeed, the new policy was even more permissive than the old, because henceforth

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consolidations were freed from the hobble of having to conform to a predetermined master plan of consolidation. The Commission was to be free to pass upon the merits of any unification which might be voluntarily submitted to it by the interested railroads. This Court has said of the 1940 amendment to Section 5, that "it authorized the approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation." *Schwabacher* v. *United States*, 334 U.S. 182, 193 (1948).

Here again, as in 1920, Congress was confronted with the alternatives of compulsory or permissive consolidation. The subject had been under discussion for years. The advantages and disadvantages of compulsory consolidation were fully canvassed in reports to Congress and in the hearings. Yet Congress deliberately rejected the principle of compulsion, and reaffirmed the policy of permissive consolidation, which is now embodied in Section 5 of the Interstate Commerce Act. And, of the utmost significance, this was five years after the enactment of the 1935 amendment to Section 77 of the Bankruptcy Act, which it is now claimed had already substantially impaired the policy against compulsory consolidation.

The foregoing history of federal legislation with reference to railroad consolidations leads irresistibly, we submit, to these conclusions:

(1) Congress had given full and careful study to such legislation during the twenty years prior to 1940.

(2) That study resulted in the enactment of the policy concerning railroad consolidation which is now embodied in Sections 1 and 5 of the Interstate Commerce Act.

(3) The policy so adopted is one which authorizes the Commission to approve consolidations voluntarily submitted to it by the affected carriers, which it finds to be in the public interest.

(4) Although it has frequently been asked to authorize the Commission to compel compulsory consolidations,

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Congress has on three separate occasions, in 1920, in 1933, and in 1940, refused to do so, but on the contrary has consistently adhered to the policy of permissive consolidation.

Mr. Justice Holmes's oft-quoted dictum has it that "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349. Here both history and logic make it apparent that Congress did not, in enacting a purely procedural amendment to Section 77(e) of the Bankruptcy Act in 1935, reverse its well-settled policy with reference to railroad consolidations and authorize the Commission to force the consolidation of nearly all the railroads in the country. While the construction relied on by the Commission and here urged by Coast Line would give the Commission power to compel consolidations only where one of the carriers involved is in bankruptcy, over one quarter of the railroad mileage in the country was in bankruptcy in 1935, when Congress is supposed to have conferred this sweeping power on the Commission. Poor's *Manual of Railroads*, 1936, p. 110 (blue). By combining bankrupt with solvent roads, it is obvious that consolidation could have been forced on a large part of the nation's railroad mileage, if the Commission's present construction of the 1935 amendment to the Bankruptcy Act is correct.

If this result was accomplished, it was accomplished without debate, without consideration, and by indirection. It cannot be supposed that Congress would thus have reversed in large part its policy against compulsory consolidation, a policy favored by railroad labor and by railroad management, through any such back-door method, without hearings and without the careful study that it always gave to the subject when it dealt with it directly in the Interstate Commerce Act.

Nowhere in all those discussions was there the slightest intimation that the Commission already possessed the power to force the consolidation of every railroad then being reorganized under Section 77 of the Bankruptcy Act. By this time, a third of the railroad mileage was in that

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status.[16] Hence, if the Commission is correct in the present case in holding that the 1935 amendment to Section 77 gave it that power, it already had a far-reaching power of compulsory consolidation. But apparently in 1940 the Commission didn't know it; the Federal Coordinator, Mr. Eastman, didn't know it; railroad labor didn't know it; railroad management didn't know it; and Congress itself didn't know it.

Such widespread ignorance by those who should have known is incredible, yet it must be believed if we accept the Commission's and the Coast Line's premise that such power was given the Commission by the 1935 amendment of Section 77. But of course there was no such ignorance by all concerned, and it would be absurd to presume it. Instead, it is perfectly obvious that all were silent about the alleged power because it simply did not exist. Not until 1945, and in this case, did anyone ever suggest that Congress in 1935—ten years earlier—had *sub silentio* reversed its long-settled policy that railroad consolidations should be voluntary, and had vested the Commission with the far-reaching compulsory power here claimed. However ingenious that claim may be verbally, it cannot stand in the light of history and settled congressional policy.

III

The Legislative History of Section 77, as Enacted in 1933 and as Amended in 1935, Makes It Clear That the "Consistency Clauses" Were Written Into the 1933 Act and Combined and Continued in the Act of 1935 for the Very Purpose of Denying to the Commission the Compulsory Power Which Had Always Been Denied to It Under the Interstate Commerce Act

In demonstrating that Congress never intended to grant to the Commission and the courts a power to force mergers or consolidations, we have recourse, as this Court did in the *Denver Case*, to "the purposes of Congress as expressed

[16] Poor's *Manual of Railroads* (1940) 184-185 (blue).

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in the words of § 77 read in the light of the contemporaneous discussion in Congress."[17]

Although respondent has admitted (*supra*, pp. 22-23) that the original Section 77, as enacted in 1933, conferred no such compulsory power, yet since the "consistency clause" of subdivision (f) of Section 77, as amended in 1935, had its origin in the two "consistency clauses" of subdivisions (b) and (e) of Section 77, as originally enacted in 1933, our study of the "contemporaneous discussion in Congress" must begin with the 1933 version of Section 77.

The "consistency clauses," as written into subdivisions (b) and (e) of the Act of 1933, originated with Mr. Joseph B. Eastman, Chairman of the Legislative Committee of the Interstate Commerce Commission. Senator Hastings had written the Chairman of the Commission on December 20, 1932, sending him a proposed amendment to the bankruptcy law which would so enlarge it as to include railroads and asking the Chairman to comment on the bill if he cared to do so. The Chairman referred this request to Mr. Eastman, as Chairman of the Commission's Legislative Committee. Thereafter, Mr. Eastman had received a new draft of the bill pending before Senator Hasting's committee, the Senate Judiciary Committee, known as "Committee Print No. 1," and also a copy of a like bill in the House and referred to the House Committee on the Judiciary as H.R. 14359. On January 31, 1933, Mr. Eastman wrote Senator Hastings a long letter reviewing the condition of the railroads of the country and the problems involved in railroad reorganization and commenting in detail on the two bills.[18]

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[17] *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.*, 328 U.S. 495, 512 (1946).

[18] This correspondence is available in a much later public document, *Railroad Reorganization—Hearings Before the Special Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary, House of Representatives—Seventy-sixth Congress, First Session, on S. 1869*, Serial No. 11, Part 1 (1939), see pages 144, *et seq.*

Mr. Eastman appended to that letter, as Appendix A, his "Proposed Amendments to H.R. 14359," in which he quoted in Roman the language of the bill and inserted in italics language he suggested be added. He suggested insertion of the "consistency clause" in the bill by the following amendment (first italicized clause) and gave his reason therefor by the following explanation:

> "Clause (3) subdivision (b), page 26:
>
> "(3) shall provide adequate means for the execution of the plan, which may, *so far as may be consistent with the provisions of sections 1 and 5 of the Interstate Commerce Act, as amended,* include the transfer of all or any part of the property of the debtor to another *railroad* corporation or to other *railroad* corporations or the consolidation of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other railroad corporation, and the issuance, *so far as may be consistent with the provisions of section 20a of the Interstate Commerce Act, as amended,* of securities of either the debtor or any such *railroad* corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes;
>
> "*Explanation.*—This act ought not to authorize railroad mergers or consolidations or the transfer of railroad properties or the issuance of railroad securities which are inconsistent with the applicable provisions of the Interstate Commerce Act, particularly the consolidation plan provisions. These amendments are intended to avoid that possibility."[19]

Thus the "consistency clause" was written into the bill that became the Act of 1933 at the express recommendation of Mr. Eastman as Chairman of the Commission's Legislative Committee and for the very purpose of making it clear that no power as to merger or consolidation of railroads would be vested in the Commission by that Act inconsistent with or going beyond its power under Sections

[19] *Id.* at 155.

1 and 5 of the Interstate Commerce Act, which gave no power of compulsory merger or consolidation but was confined to empowering the Commission to authorize only a *voluntary* merger or consolidation.

That this was the intention of the Congress is inescapable from the debates on the 1933 Act. In the House, Congressman Horr was concerned lest the consolidation provisions of clause (3) of subdivision (b) of the bill might give the Commission enlarged powers as to consolidations. The following colloquy between him and Mr. Hatton Sumners, Chairman of the Committee on the Judiciary and in charge of the bill on the floor, occurred:

> "Mr. Horr: May I inquire whether or not, where the word 'reorganization' is used, the gentleman is of the opinion that this would encourage consolidations of railroads?
>
> "Mr. Sumners of Texas: They could not be consolidated in violation of the interstate commerce act.
>
> "Mr. Horr: They would first have to go through that?
>
> "Mr. Sumners of Texas: They would first have to go through that."[20]

After a number of other Congressmen had expressed the fear that the legislation would increase the Commission's consolidation power, Congressman Rayburn took the floor to allay that fear. He was Chairman of the Committee on Interstate and Foreign Commerce charged with responsibility for the Interstate Commerce Act. He said:

> "Fear has been expressed that with the enactment of this bill the powers of the Interstate Commerce Commission and the courts over consolidations and mergers would be expanded. It is my firm conviction that this proposal in specific provisions safeguards the present consolidation and merger provisions of the interstate commerce act *and gives no additional authority*

[20] 76 Cong. Rec. 2909 (1933).

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to the Commission or the courts in these matters."[21] (Italics ours.)

The positive intent of Congress, in passing the Act of 1933, not to extend or enlarge the Interstate Commerce Act powers of the Commission over mergers and consolidations, and not to give it any compulsory power, could not have been made more clear. That was the very purpose of writing in the "consistency clause" and the very reason Mr. Eastman suggested to Senator Hastings that it be written in.

As we have shown, Congress not only wrote the "consistency clause" into subdivision (b) of the Act of 1933 but repeated it in broader terms in subdivision (e) of that Act so as to require consistency not only with the "provisions" but also with the "purposes" of the Interstate Commerce Act.

But, as we have further shown, the whole substance and effect of both those "consistency clauses" was combined by Congress into one clause, as a matter of draftmanship dropped down to and written into subdivision (f) of the amendatory Act of 1935, expressly requiring consistency "with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended."

There stands in the Act of 1935, in one clause, the whole substance and effect of the two "consistency clauses" of the Act of 1933 which were so meaningful in 1933 as forbidding to the Commission any compulsory power to enforce involuntary merger or consolidation. The only difference is one of purely mechanical draftsmanship as to the subdivision into which the combined clause of the Act of 1935 was placed, subdivision (f) instead of subdivisions (b) and (e) as in the Act of 1933.

The reason for that mechanical shift of the position of the "consistency clause" in Section 77 is not disclosed by the legislative history of the 1935 Act. But that legisla-

[21] *Id.* at 2917-2918.

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tive history does clearly disclose that Congress intended by that clause in 1935 just what it intended by the predecessor clauses in 1933.

The Commission, in its Fourth Supplemental Report in this case, 267 I.C.C. 729, 731 (R. Vol. IV), seized upon this shifting of the position of the "consistency clause" as creating a profound revolution in reorganization law, so as to give it the compulsory power to enforce involuntary merger or consolidation which the like clauses of the 1933 Act were expressly intended to forbid. The majority of only six members of the eleven-member Commission there said:

> " * * It would be strange for Congress, after giving us express authority to do certain things under the Bankruptcy Act in order to rehabilitate an insolvent carrier,[22] to thereafter[23] limit our authority by the express provisions of the Interstate Commerce Act."

As we have shown (*supra*, pp. 11-12), Circuit Judge Sibley specifically disapproved this reasoning.

We point out that the Commission majority, in asserting it to be "strange" that Congress would limit the Commission's authority "by the express provisions of the Interstate Commerce Act," completely overlooked the fact that Congress went even further and expressly limited its authority also to consistency with the "purposes" of that Act.

And we would further suggest that it would be far stranger for Congress, by this mechanical shift of the position of the consistency requirements to subdivision (f) of the Act of 1935, to have intended a major revolution in railroad reorganization law never mentioned or suggested in the course of the legislative history, the granting of the

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[22] Obviously referring to the merger and consolidation provisions of subdivision (b) (5) as they now stand in Section 77, not immediately connected with the "consistency clause" of subdivision (f).

[23] Obviously referring to the "consistency clause" as it now stands in subdivision (f).

power to enforce compulsory merger or consolidation, which power Congress ever theretofore and thereafter was so careful to deny to the Commission.

We now turn to the "contemporaneous discussion in Congress" leading to the amendatory Act of 1935 to show that by that Act, as by that of 1933, there was no enlargement of the Commission's powers as to mergers and consolidations.

1. Intent of the Draftsman.

Mr. Leslie Craven, the author of the bill in its original form, was personally in favor of forced consolidations of railroads and was the author of a plan for such consolidations to include the use of the reorganization device. It is clear, however, from his testimony at hearings on H.R. 6249, that no such change in the Commission's power was intended by this bill. There he was testifying as counsel for the Federal Coordinator, Mr. Eastman, who said of Mr. Craven at the opening of his own statement:

> "I shall not speak at length this morning, gentlemen, because I want most of the talking to be done by my counsel, Mr. Leslie Craven, who has made an intensive study of this matter and is much better equipped to deal with the details than I am." [24]

Thus vouched for, Mr. Craven made an extended statement. In the course of it he was discussing the provisions of subsection (o) of the bill which were intended to make clear the power to permit the voluntary sale or abandonment of a non-profitable branch line of a debtor, in view of doubts which existed as to whether the Frisco, in reorganization, could be allowed to sell the Fort Worth & Rio Grande to the Santa Fe. Thereupon, there occurred the following colloquy, into which we have inserted in brackets

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[24] *Hearings Before Committee on the Judiciary on H.R. 6249*, 74th Cong., 1st Sess. (1935) 13.

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the text of the Committee Print of April 12, 1935,[25] to which Mr. Craven referred by page and line references. Without the text of the Committee Print to which Mr. Craven referred, his references to pages and lines of it are meaningless to the reader. This is the colloquy:

> "The Chairman: Mr. Craven, where is the provision in this bill which limits the right to sell, by the rules and regulations prescribed by the Interstate Commerce Commission? Where is that jurisdiction in the Interstate Commerce Commission retained in this bill?
>
> "Mr. Craven: The jurisdiction of the Interstate Commerce Commission as to abandonments and sales?
>
> "The Chairman: Sales and consolidations. This would amount to a consolidation, would it not?
>
> "Mr. Craven: There might not be a consolidation. They might simply sell the property and not consolidate it.
>
> "Is your question directed to the bill that we propose here?
>
> "The Chairman: Yes, sir.
>
> "Mr. Craven: You will find it in line 19, page 34.
>
> ["* * * only with the approval and authorization of the Commission when required by the Interstate Commerce Act, as amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge."]
>
> "There is another provision with reference to the jurisdiction of the Commission as to sales and consolidations. I do not know that I can lay my finger on it this minute, *but it has the same provision which was in the previous act. We have not disturbed it.*
>
> "The Chairman: It does not modify this power, does it?
>
> "Mr. Craven: No, sir.
>
> "The Chairman: Anyhow, it is in the law, and you say that it is in this bill?
>
> "Mr. Craven: Yes.
>
> "The jurisdiction of the Commission with reference to the issuance of securities, or with reference to sales,

[25] The discussion in hearings on H.R. 6249 was based on the Committee Print of April 12, 1935, *id.* at 175, 190.

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consolidations or mergers of debtors' property, is in lines 1 to 8 on page 26."[26]

["Upon such final confirmation of a plan in accordance with the provisions of this subdivision, the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan *and not inconsistent with the provisions and purposes of the Interstate Commerce Act as amended.*"] (Italics ours.)

Thus Mr. Craven referred the Committee Chairman (Mr. Hatton Sumners) to the "consistency clause," which read in the Committee Print of April 12, 1935, "not inconsistent with the provisions and purposes of the Interstate Commerce Act as amended." That language was changed in the final enactment, without change of meaning, to read "not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended."[27]

2. Intent of the Sponsor, Mr. Eastman

The recommendation that Section 77 be revised was made in the 1934 Report of the Federal Coordinator of Transportation.[28] Mr. Eastman outlined the defects in the 1933 Act and suggested remedial changes. Attached to this report was the text of a proposed bill drafted by Mr. Craven embodying these recommended revisions.[29] This bill was the basis of the 1935 revision of Section 77.

In a separate part of the same report, Mr. Eastman reviewed the subject of consolidations and unifications. Com-

[26] *Id.* at 59.

[27] 11 U.S.C. 205(f).

[28] H.R. Doc. No. 89, 74th Cong., 1st Sess. (1935) 100-103.

[29] *Id.* at 229-243.

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menting on the weaknesses of the Interstate Commerce Act, Mr. Eastman said:

> "Consummation [of consolidation plans] is dependent wholly upon the voluntary action of the carriers. No matter how good a plan it may be, it can only be made effective to the extent that it is to their liking."[30]

In concluding the section of the report dealing with consolidations, Mr. Eastman said:

> "Under present financial conditions, however, it seems unlikely that there will be immediate need for these changes in the statutory provisions relating to consolidations or other unifications of carriers, and for that reason, and in view of the extent and complexity of the other transportation legislation which is herein recommended, these changes will not now be recommended."[31]

In the light of the above, it is clear that Mr. Eastman considered the lack of power in the Commission to force consolidations, if a defect, to be a defect in the Interstate Commerce Act and not a defect in Section 77. In recommending changes in Section 77 and not in the consolidation provisions of the Interstate Commerce Act, Mr. Eastman did not intend that the suggested revision of Section 77 should have the effect of enlarging the Commission's power over consolidations. In fact he expressly disclaimed such an intention.

3. Intent of the Legislators

The changes in Section 77 effected by the 1935 Act were summarized in detail on the following occasions, and a change in the Commission's power over consolidations was never referred to as a feature of the bill.

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[30] *Id.* at 41.

[31] *Id.* at 43.

1. By Mr. Leslie Craven, author of H.R. 6249 and counsel to the Coordinator of Transportation in hearings before the House Judiciary Committee.[32]

2. By Mr. Eastman in "Report of the Federal Coordinator of Transportation, 1934," pp. 100-103, incl. It was in this report that Mr. Eastman referred to the lack of power in the Commission to force consolidations as being a defect in the Interstate Commerce Act and that he recommended that no remedial legislation be considered at that time.[33]

3. Report of the Senate Committee on Interstate Commerce, to accompany S. 1634.[34]

4. Report of the House Committee on the Judiciary, to accompany H.R. 8587.[35]

5. By Mr. Wheeler on the Senate floor in debate on S. 1634.[36]

6. By Mr. McLaughlin of the Judiciary Committee on the House floor in debate on H.R. 8587.[37]

The bill revising Section 77 was a bill of specific and enumerated remedies for acknowledged defects in the original Section 77. In each of the instances above set out, when the bill was summarized for the benefit of the Congress, the summary was limited to an enumeration of the shortcomings of the 1933 Act and the proposed remedies for them found in the Report of the Coordinator, 1934.

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[32] *Hearings Before Committee on the Judiciary on H.R. 6249,* 74th Cong., 1st Sess. (1935) 23-63, 304-330.

[33] Report of the Coordinator, 1934, H.R. Doc. No. 89, 74th Cong., 1st Sess. (1935) 40-43.

[34] Sen. Rep. No. 1336, 74th Cong., 1st Sess. (1935).

[35] H.R. Rep. No. 1283, 74th Cong., 1st Sess. (1935).

[36] 79 Cong. Rec. 13764-5 (1935).

[37] 79 Cong. Rec. 13301 (1935).

In none of them was there any suggestion that a drastic power to force consolidation of unwilling debtors with outside railroads was to be conferred on the Commission.

4. The Power Claimed by the Commission Can Not Come From an Absence of Express Prohibition

In the holding by the majority of six members of the Commission, in 267 I.C.C. 731-732, which was expressly disapproved by Circuit Judge Sibley, that majority made the novel argument that a plan calling for a forced merger was not inconsistent with the Interstate Commerce Act for the reason that "* * * There is nothing in the Interstate Commerce Act to prohibit us from approving such a transaction."

This propounds a wholly new theory of administrative law—that an administrative body possessing only delegated powers may exercise any power not specifically prohibited to it by the delegating statute. This is not the law.

Moreover, controlling considerations are that Congress has consistently, in 1920, 1933 and 1940, declined to grant to the Commission the power to force mergers or consolidations, although it has often been urged to grant such power, and that the legislative history of Section 77, as originally enacted in 1933 and as amended in 1935, positively discloses the consistent intent of Congress to deny such compulsory power under Section 77.

To say that in 1935 Congress reversed this historic policy, without any discussion or mention of such intention, as applied to 30 per cent of the country's railroad mileage then insolvent, is to ignore realities.

IV

The Legislative History of the Act of 1935 Makes It Clear That by the "Cram-Down" Provision of the Provisos of Subsection (e) Congress Did Not Intend to Nullify the "Consistency Clause" and to Give to the Commission or to the Courts the Compulsory Power Which It Has Always Refused to Give Under the Interstate Commerce Act

As we have seen under Point I, the "cram-down" provision of subsection (e), written into Section 77 by the amendatory Act of 1935, gives no power at all to the Commission. Whatever power it confers is given only to the district judge, as one of the provisos of that long, procedural subdivision, and it is a power to the judge to be exercised only in the final confirmation stage of a Commission-approved plan which has previously been approved by the judge and by all judicial review of his approval.

We have also seen that, if we are right in the contention that the "consistency clause" of the subsection (f) of the amendatory Act of 1935, read in the light of the corresponding "consistency clauses" of the Act of 1933 and in the light of the long history of the Interstate Commerce Act, denies to the Commission the compulsory power to enforce mergers or consolidations always denied to it under the Interstate Commerce Act, then no plan for a forced merger or consolidation of railroads not voluntarily consented to by the majority of the owners of each such railroad could ever be approved by the Commission and by it certified to the district court or could, therefore, ever reach the judge at the confirmation stage to be subjected to his power under the "cram-down" provision.

It will be further recalled that Section 77 nowhere gives the district court, or the judge thereof, any power to initiate and adopt, or initially to approve, any plan of reorganization, that function being wholly committed to the Commission, the only power of the judge being to approve or disapprove a plan initiated or adopted by the Commis-

sion and by it certified to the district court and finally to confirm or to refuse to confirm such a plan, after the Commission has polled the security-holders.

The question, therefore, naturally arises as to what Congress had in mind and intended by enacting, for the first time in 1935, the "cram-down clause" of subdivision (e); that is, Congress intended to give to the judge, and clearly to him alone, the power to cram *what* down *whose throat* and *under what circumstances?* Who was going to get such forced feeding?

As we shall show, and as the legislative history of that provision will, we think, make clear, it was certainly never intended by the "cram-down clause" of subdivision (e) to give to the Commission the very compulsory power denied to it by the "consistency clause" of subdivision (f). It was devised and intended as a procedural device given to the judge for intramural application, at the final confirmation stage, between and among the creditors and security-holders of the debtor, within the household of the family of those owning and directly interested in the debtor corporation and its properties. It was a power only to prevent *dissident minorities* within that household from blocking, without reasonable justification, from "highjacking" for ulterior motives, a plan fair and equitable *as among that family,* and agreed to by the majority of the equitable owners of the debtor and its railroad properties.

Such a device, with such a purpose, is in complete harmony with the "consistency clause" of subdivision (f) and with the entire history of the "provisions and purposes" of the Interstate Commerce Act, whereas the "cram-down clause," if construed to give *to the Commission* the power here claimed, is in direct conflict with the "consistency clause" and with the history of the Interstate Commerce Act.

The "cram-down clause" certainly was never conceived or intended as a device to enable an outside railroad, the respondent, to propose to the Commission and to have the

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Commission approve a plan to enable the outsider to acquire and absorb the debtor railroad and its properties, to deprive the equitable owners of debtor of their legal interests in the debtor and its properties without their consent, and to force them, at a price to be fixed by the Commission, to an unwilling exchange of their existing rights for rights in another corporation and its properties which they do not want.

That is the use the Commission has undertaken to make in this case of the judicial "cram-down" device and the majority of the Court of Appeals below has approved that use. It amounts to expropriation and condemnation, at a price fixed by an administrative tribunal, of the property of the owners of the Florida East Coast. As Circuit Judges Russell and Borah well said in their dissent below, the gravest question of the constitutionality of the "cram-down" provision is raised by the construction and use here made of that clause by the majority of the Commission and approved by the majority of the Court of Appeals below. Under the settled principle this Court should avoid a construction that raises such question. *Crowell* v. *Benson*, 285 U.S. 22, 62; *United States* v. *Rumely*, 345 U.S. 41, 46, decided March 9, 1953.

1. Reasons for Enacting the "Cram-Down" Provision

Experience under the 1933 Act revealed a power in minority groups, disproportionate to their size and importance, to obstruct a reorganization by rendering it impossible to secure the two-thirds approval necessary to the effectuation of a plan.

In his introductory remarks at hearings on the proposed 1935 Section 77, Mr. Eastman, a member of the Commission and then Federal Coordinator of Transportation, pointed out this defect of the 1933 Act:

> "Notwithstanding these improvements which were undoubtedly brought about by section 77 [of 1933], it has developed in experience that there are certain

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defects in the act as it now stands. Perhaps the mos serious defect is that it was not realized when the ac was passed to what extent it put it in the power of th non-assenting classes of security holders to prevent reorganization. Under the old equity practice the could be brought in line by the sale of the property a an upset price. Under the present plan, if it prove impossible to secure the consent of two-thirds of an class of security holders, that prevents a reorganiza tion unless it can be shown that the company is insol vent and those particular securities have no value.'"

Mr. Leslie Craven, counsel to Mr. Eastman and drafts man of the 1935 Act, similarly, in his explanatory remark to the Judiciary Committee, pointed out why there ha been so little progress in effecting reorganizations unde the 1933 Act. He attributed the delay to the fact tha small groups of creditors could block a reorganization pla by the inability to get two-thirds of each class thereof t consent. This evil was particularly pronounced in thos reorganizations in which there were many classes of cred itors. He said:

"'* * * unless the creditor is taken care of in othe respects—that is, unless you protect him by a sal subject to his lien which, of course, does not perm the shaking of him loose, or a sale at an upset pric with a transfer of his lien to the proceeds of the sal in which case there is no reduction in his claim, c payment in cash. That puts the creditor in a positio where he is able to block the plan, because the pla cannot be put through unless you take care of him i cash or in the manners which I have just outlined.

"The significance of that you will seen (sic) whe you understand that in the *Missouri Pacific case* ther were 72 different classes of stockholders and cred tors. In the *Missouri Pacific case* they have the larg loan of the Morgans to the Missouri Pacific, abou $6,000,000, which they have put in a separate clas

[38] *Hearings Before Committee on the Judiciary on H.R. 624* 74th Cong., 1st Sess. (1935) 15.

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> That means that you cannot put through a plan in the *Missouri Pacific case* unless you pay the Morgans the $6,000,000 or in some other manner meet their terms."[39]

In his 1934 report as Federal Coordinator of Transportation, Mr. Eastman pointed out the shortcomings of the 1933 Act, suggested changes and submitted the text of a bill which as revised became the 1935 Section 77. There, too, he pointed out the difficulties involved in obtaining consents:

> "While it is not thought desirable to dispense with the securing of consents from the creditors and shareholders, it is clear that there should be provisions whereby a court may, under some circumstances, make effective a fair and equitable plan *over the dissent of minorities,* under an arrangement insuring a full hearing to all of the parties concerned and an adjudication by the Commission and the court establishing the fairness of the plan."[40] (Italics ours.)

The result of these recommendations is what is referred to as the "cram-down" provision. In this case, for the first time, it is contended that the "cram-down" provision gives the Commission and the court a power unrestricted by the "consistency clause." In the light of the intent of the proponents of this clause, and in the light of its subsequent interpretation, it is clear that this is not so.

2. A Limited Application of the "Cram-Down" Provision Was Intended

That the "cram-down" provision was intended to apply only to dissenting minority creditors, and then only to the extent that they were dissatisfied with their participation

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[39] *Id.* at 25-26.

[40] Report of Coordinator 1934, H.R. Doc. No. 89, 74th Cong., 1st Sess. (1935) 101.

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in the distribution of the debtor's estate, is found in references to these provisions by Mr. Eastman, by congressional committee reports, and by the author of Section 77.

In recommending to Congress the enactment of remedial legislation, Mr. Eastman pointed out the obstructive powers of minorities in reorganizations. After suggesting that provision be made for approval of a plan "over the dissent of minorities," he said:

> "Arbitrary compulsion of plans over the dissents of the interested classes is not intended, nor is it believed that the courts will override strong dissents by any large number of such classes, or by a single large class, excepting where it is established that they have no interest in the property. Rather, the purpose is to prevent the obstruction of plans which are favored by the larger classes of creditors or shareholders, but which are obstructed by minorities in the smaller classes in the attempt to secure unduly preferential treatment. From a legal standpoint there are no apparent objections to this course. It puts emphasis upon the adjudication of these rights by providing for hearings before the Commission and the courts under prescribed principles of substantive law, whereby there must be, among other things, a proper recognition of the priorities of the respective interests."[41]

When the bill of 1935 to amend Section 77 was presented to the Senate for consideration, Senator Wheeler, in the Committee report accompanying the bill, made clear the origin and purpose of the "cram-down" provision. The report said, at p. 2:

> "While section 77 is in general an admirable piece of legislation, in certain respects it has been found unworkable. The act was designed to prevent the obstruction of reorganizations by minorities by providing that the approval of a reorganization plan by two-thirds of any class of creditors or security holders is binding upon the minority in a class. But, if not so

[41] *Id.* at 101-102.

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approved, a fair and equitable plan may be defeated. Not only may one-third of the security holders of any class prevent a fair plan from binding that class and thus require that their securities be bargained for, but the mere failure to vote upon a plan by those holding one-third of the securities of a single class will effectively block any reorganization. The formidability of such obstructive possibilities appears clearly in the pending reorganization of the Missouri Pacific, where the claim is made that there are 72 different classes of security holders. One bank loan from J. P. Morgan & Co. is put in a separate class. Each of such classes of creditors, if it does not agree to a plan, can drive a bargain with those endeavoring to reorganize the company, and is in a superior bargaining position. * * *

"In order to remedy these defects, S. 1634, as amended, provides that two-thirds of those of each class who vote upon a plan will bind the dissenters or those failing to vote. But it also provides that the court may make effective a fair plan where the parties do not agree. * * * "[42]

The "cram-down" provision of Section 77 as amended in 1935 was discussed at some length by Mr. Leslie Craven, draftsman of the bill, and by Mr. Warner Fuller, who participated in its drafting, in a review of the 1935 Section 77.[43] Considerable space was devoted to the role of the "cram-down" provision and to its constitutionality. The following was given as the reason for its adoption:

"This provision was added in order to reduce the power of minority holders to force inequitable adjustments as the price of their acquiescence."[44]

In concluding their discussion of this provision, the authors reiterated the contention that the "cram-down" provision was of limited application:

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[42] Sen. Rep. No. 1336, 74th Cong., 1st Sess. (1935) 2-3.

[43] Craven and Fuller, *The 1935 Amendments of the Railroad Bankruptcy Law* (1936) 49 Harv. L. Rev. 1254.

[44] *Id.* at 1277.

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> "These particular provisions of Section 77, as amended, are primarily procedural provisions, needed, on account of the multiplicity of claims arising in the reorganization of a complex property, in order that the substantive rights of the parties generally may be fully protected against imposition from obstructive minorities."[45]

In a symposium on railroad reorganization, in which every phase of the problem was covered in detail by a group of leading reorganization authorities, Mr. Warner Fuller, who assisted Mr. Craven in the drafting of the 1935 Act, had this to say of the "cram-down" provision:

> "It was expected that these provisions would be used only in extraordinary situations. They were added because it was thought that particular reorganizations might be seriously impeded or prevented through inability to raise the amount of cash which would otherwise be necessary. While these provisions provoked charges of unconstitutionality, they were defended on the seemingly sound basis that the accomplishment of fair and sound reorganizations, which are required both in the public and private interest, would be rendered difficult if not impossible if cash payment to dissenting classes were an invariable requirement."[46]

It is thus seen that the "cram-down" provision was intended to establish the relationship of classes of creditors with relation to each other, not to force the submission of a majority of the creditor classes to the wishes of outside forces. Reorganizations have as their primary purpose the revaluation and realignment of the interests of creditors of the insolvent carrier, and, if this revaluation and realignment was to be made effective at all, the "cram-down" provision was required.

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[45] *Id.* at 1283.

[46] Fuller, *Background and Techniques of Railroad Reorganization* (1940), VII Law & Contemp. Prob. 377, 390.

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But to read into this "cram-down" provision a power outside of the area of creditor participation is to read into it a meaning never intended by anyone intimately associated with its drafting and enactment.

The Court is undoubtedly familiar with Duke University Law School's *Law and Contemporary Problems.* It is unique among law journals in this country in that it does not cover a variety of subjects in each issue. Each issue undertakes to present a complete symposium covering every facet of a particular subject-matter. It is, we think, very important to note that the issue of that publication from which above quotation from the Warner Fuller article was taken, Vol. VII, Summer, 1940, was such a symposium on the subject "Railroad Reorganization." It undertook to cover every important aspect of that subject and especially the purposes and effects of the Act of 1935. It may be read from cover to cover and nowhere in it will there be found any suggestion that that Act gave to the Commission or the court the power to enforce involuntary merger of the Section 77 debtor with an outside railroad.

We quote again what Circuit Judge Sibley said as to the limited application to be given to the "cram-down clause" in this case, in his opinion in 81 F. Supp. 926, 932:

> "* * * The debtor, its property and affairs now belong in equity to the creditors, and more specifically to the refunding bondholders. The full jurisdiction and control over them is in this court. The refunding bondholders by an overwhelming majority do not consent. If the court has the power as a court of bankruptcy to consent for them, under the circumstances of this case it should refuse to do so. I do not think Congress intended to force a merger undesired by the majority in amount of the affected parties by permitting a merger to be part of a [Commission-approved] plan. This conclusion makes it unnecessary to determine whether the court's power in bankruptcy could be extended to force a merger consistently with the Fifth Amendment. It also ends this plan. * * *"

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With that holding Circuit Judges Russell and Borah wholly concurred in their dissent in the Court of Appeals below, in 201 F. 2d 325, 331-332.

Circuit Judges Hutcheson, Holmes and Rives decided the question of statutory power solely, so far as the prevailing opinion below shows, on the previous holding by Judges Hutcheson and Holmes, in 179 F. 2d 538, as having established "the law of the case" in that regard. So the majority decision here under review really stems from the judgment of only two Circuit Judges, three Circuit Judges, including the senior of them all, Judge Sibley, having held to the contrary.

We submit that on the question here under review this Court should follow Judges Sibley, Russell and Borah, rather than the majority below which stems only from the original holding by Judges Hutcheson and Holmes in 179 F. 2d 538.

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V

Conclusion

We submit that this Court should reverse the judgment of the Court of Appeals for the Fifth Circuit, with direction to that court to return the case to the District Court below, with instruction to disapprove the pending plan of reorganization as illegal as being in excess of statutory power.

Respectfully submitted,

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